STATE OF MICHIGAN

COURT OF APPEALS

DELON ERIC BATTAGLIA,

Plaintiff-Appellant,

v

LOU DOUCET, INC., d/b/a ANTHONY'S PIZZA,

Defendant,

and

STATE MUTUAL INSURANCE COMPANY,

Garnishee Defendant-Appellee.

UNPUBLISHED
June 26, 2001

No. 217683
Oakland Circuit Court
LC No. 95-490638-NI

Before: Markey, P.J., and Jansen and Zahra, JJ.

MARKEY, J. (dissenting).

I respectfully dissent from the majority's decision as I believe that they have misanalyzed this case. I concur with the majority's rendition of the facts and chronology of the case.

Plaintiff argues that his claim arises out of Doucet's negligent hiring and negligent supervision of his employee Steven Clament and not out of the use of an auto. I agree, and emphasize this point. Regarding this appeal, plaintiff's claim is directed at defendant Doucet only, not at Steven or Christine Clament. The claim against Doucet is for negligent hiring and negligent supervision. The claim against Doucet has nothing to do with the vehicle collision itself, but with the manner in which Doucet hired and supervised his employee. Consequently, the automobile exclusion simply does not apply with respect to the claim of negligent hiring and negligent supervision against Doucet. See, e.g., *Wakefield Leasing Corp v Transamerica Ins Co*, 213 Mich App 123; 539 NW2d 542 (1995) (claims of failure to warn of other robberies in the area, failure to properly train employees to warn drivers, failure to instruct employees to notify the police when drivers are sent to high crime areas, and failure to install a partition in a taxicab are claims that do not relate to the operation, maintenance, or use of a motor vehicle itself, and the insurer had a duty to defend under the commercial general liability policy).

Therefore, I conclude that the trial court erred in ruling that the automobile exclusion applies to plaintiff's claim of negligent hiring and negligent supervision against Doucet. Further, the insurance policy specifically applies to bodily injury caused by an occurrence that takes place in the coverage territory and during the policy period. Occurrence is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Coverage territory is also defined in the policy and includes the United States, its territories and possessions, Puerto Rico, and Canada. There is nothing in the insurance policy that excludes a claim of negligent hiring and negligent supervision.

Accordingly, the trial court erred in ruling that the automobile exclusion applied to preclude coverage in this case. Because plaintiff's claim is of negligent hiring and supervision against Doucet, the automobile exclusion simply does not apply. Rather, there being no material factual dispute, summary disposition should have been entered for plaintiff because the claim of negligent hiring and negligent supervision is clearly covered by the insurance policy. I would reverse the trial court's grant of summary disposition in favor of State Mutual and remand for entry of summary disposition in favor of plaintiff.

Plaintiff next argues that the consent judgment can be enforced against State Mutual where State Mutual received notice of Doucet's claim, but chose not to defend, and a good faith judgment was subsequently entered. Plaintiff cites *Clay v American Continental Ins Co*, 209 Mich App 644; 531 NW2d 829 (1995), in support of its argument that State Mutual is liable under the consent judgment where it received notification of the claim, and I agree that *Clay* is indistinguishable from the present case.

In *Clay, supra* at 645-646 the plaintiff filed a medical malpractice claim against both the clinic and the doctor, who both were insured under a policy with a limit of $200,000. The insurer of that policy agreed to settle for the policy limits. *Id.* at 646. When the plaintiff, however, requested an attestation that no other insurance policies existed, the defendants discovered that the clinic had an additional policy and notified the additional insurer of the claim. *Id*. The additional insurer denied coverage and the parties consented to a judgment of $1,200,000, in which it was agreed that the plaintiff could only collect $200,000 from the defendants and must seek enforcement of the remainder of the judgment from the additional insurer only. *Id.* This Court found that the judgment was enforceable against the additional insurer because it did not relieve the defendants of any liability, but instead limited the assets from which the plaintiff could pursue. *Id.* at 649. If the additional insurer was liable under the policy, then the consent judgment did not relieve it from its obligation to indemnify the clinic. *Id.* This Court remanded for a determination of whether the additional insurer was liable under the policy. *Id.* at 650.

The present case is indistinguishable. The consent judgment did not release Doucet from any liability, it merely limited the assets from which plaintiff could pursue his judgment. Further, State Mutual received written notice of the claim and the complaint itself in a timely manner, had an opportunity to investigate the claim, and denied coverage by relying solely on the automobile exclusion. State Mutual never filed any answer to the complaint, and never filed a declaratory judgment to determine its duty to defend or indemnify. State Mutual also denied that it owed any money under the garnishment action, relying exclusively on its letter to Doucet claiming that the automobile exclusion applied. Therefore, the trial court erred in ruling that

State Mutual was not liable under the consent judgment because of lack of knowledge or participation. The consent judgment is enforceable against State Mutual.

Hence, I would reverse and remand for entry of summary disposition in favor of plaintiff in the amount of $140,000 as set forth in the consent judgment.

/s/ Jane E. Markey